COURT OF APPEALS
DECISION
DATED AND FILED

May 6, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

Nos. 98-3069-CR
98-3070-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

NO. 98-3069-CR

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

ROCKY A. KNOBLE,

DEFENDANT-RESPONDENT.

NO. 98-3070-CR

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

KEITH A. JOHNSON,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Richland County: EDWARD E. LEINEWEBER, Judge. *Affirmed.*

DYKMAN, P.J.[1] The State appeals from an order granting Rocky Knoble and Keith Johnson's motions to suppress evidence. The issues on appeal are: (1) whether Knoble and Johnson voluntarily consented to a search; and (2) whether there was a sufficient break in the causal chain between the alleged involuntary consent and the seizure of evidence to dissipate or attenuate the taint caused by the earlier alleged coercion. We conclude the State has failed to meet its burden of showing clear and convincing evidence that the consent to search was freely and intelligently given, and that the subsequent search of Knoble and Johnson's apartment was not sufficiently attenuated from the involuntary consent. Accordingly, we affirm.

BACKGROUND

On November 21, 1997, at approximately 7:55 p.m., Detective J.R. Spencer of the Sauk County Sheriff's Department stopped Knoble and Johnson's vehicle because it had a defective headlamp. After questioning Knoble and Johnson, Detective Spencer requested permission to search the vehicle. Johnson agreed.

After the search, Johnson admitted that he and Knoble had smoked marijuana, and Knoble indicated that Johnson might have a bag of marijuana. After receiving this information, Officer Jerry Strunz of the Sauk Prairie Police Department, who was also at the scene, had a dog search around the vehicle for

[1] This appeal is decided by one judge pursuant to § 752.31(f), STATS.

drugs. Upon further questioning, Knoble and Johnson admitted that they had contraband at their apartment, and they agreed to allow Detective Spencer to meet other Richland County deputies at their residence, so they could turn the contraband over to the officers. Detective Spencer followed behind Knoble and Johnson as they returned home in their own car.

Upon arriving at Knoble and Johnson's apartment, Detective Spencer met with Deputy Rick Wickland and Deputy Dane Kanable, of the Richland County Sheriff's Department. Deputy Wickland confirmed that Knoble and Johnson had some items they wished to turn over and asked if he could accompany them into their apartment. Johnson and Knoble agreed.

The officers entered the apartment and Johnson and Knoble began turning drug paraphernalia over to them. Deputy Wickland then asked if it would be permissible for a police dog to search the residence. Knoble and Johnson agreed. During the search, the officers seized drugs, drug paraphernalia and money.

After the search was completed, Deputy Wickland read Knoble and Johnson their rights and tape recorded their statements. Both Knoble and Johnson were advised that they were not under arrest, and that they would not be arrested after making their statements. In their statements, Knoble and Johnson admitted that they gave permission for the officers to search the vehicle at the initial stop, to follow them back to their residence to retrieve other paraphernalia, and to have the police dog search their residence. After taking their statements, the officers left Knoble and Johnson's apartment and returned to the sheriff's department at approximately 10:15 p.m.

On February 24, 1998, Knoble and Johnson were charged with possession of a controlled substance, contrary to §§ 961.41(3g)(e), 961.14(t) and 939.05, STATS., and with possession of drug paraphernalia, contrary to §§ 961.573(1) and 939.05, STATS. On April 9, 1998, Johnson's attorney filed a motion to suppress and an affidavit alleging that Knoble and Johnson's consent was not freely and voluntarily given. Specifically, the affidavit alleged that consent was given only as a result of interrogation, fear and intimidation. Later, Knoble's attorney also filed a motion to suppress.

A suppression hearing was held in both cases on June 4, 1998, and was continued on July 15, 1998. The only witness to testify on behalf of the State at the hearings was Deputy Wickland. At the hearing, the taped statement of Knoble and Johnson was played before the court, and Wickland's police report and a transcript of the taped statement were entered into evidence, as well.

After the State rested its case, Knoble's attorney moved to suppress because the State had failed to meet its burden of proof to show clear and convincing evidence that Knoble's consent was voluntarily given. Johnson's attorney added that his affidavit should be considered by the court to show that consent was not freely given, and that the evidence should therefore be suppressed as fruit of the poisonous tree. The State objected to Johnson's reliance on his affidavit because he lacked personal knowledge of the events and moved the court to disqualify him from the case. The State also argued that the tape was evidence that the consent was, in fact, voluntary.

The court concluded that the affidavit in question was only being used to set out various assertions regarding the facts and circumstances surrounding the incident. It compared the use of the affidavit in this case to those

used in civil cases and noted that some attorneys in civil cases make factual assertions in their motions and do not swear to them, while others include affidavits in support of the motions to do the same thing. As a result, the court denied the State's motion to disqualify Johnson's attorney.

The court also found that although the tape was evidence of the defendants' consent, it was not persuasive evidence of the *voluntariness* of the consent. (Emphasis added.) The court concluded that the State had not met its burden of showing clear and convincing evidence that consent was voluntary, and granted both Johnson and Knoble's motions to suppress. The State appeals.

STANDARD OF REVIEW

Voluntariness of consent is a question of constitutional fact. *See* ***State v. Phillips***, 218 Wis.2d 180, 195, 577 N.W.2d 794, 801 (1998). We will not overturn the circuit court's findings of historical or evidentiary fact unless those findings are clearly erroneous. *See* ***id.*** However, we independently apply the constitutional principles to the facts as found to determine whether the standard of voluntariness has been met. *See* ***id.***

DISCUSSION

When the State attempts to justify a warrantless search on the basis of consent, the Fourth Amendment requires that the State demonstrate, by clear and convincing evidence, that the consent was voluntarily given. *See* ***Phillips***, 218 Wis.2d at 196, 577 N.W.2d at 802. Specifically, the State must prove, by clear and positive evidence, that the search was the result of a free, intelligent, unequivocal and specific consent without duress or coercion, actual or implied. *See* ***Gautreaux v. State***, 52 Wis.2d 489, 492, 190 N.W.2d 542, 543 (1971). If

consent is granted only in acquiescence to an unlawful assertion of authority, the consent is invalid. *See* ***Bermudez***, 221 Wis.2d 338, 348, 585 N.W.2d 628,633 (Ct. App. 1998).

In determining whether consent was voluntary, we must look at the totality of the circumstances, considering the circumstances surrounding the consent and the characteristics of the defendant.[2] *See* ***Phillips***, 218 Wis.2d at 198, 577 N.W.2d at 802. Criteria that may be considered in our determination are: (1) the use of misrepresentation, deception or trickery to entice the defendant to give consent; (2) the use of threats, physical intimidation or punishment of the defendant; and, (3) the characteristics of the defendant such as intelligence, education, physical and emotional condition and prior experience with the law. *See* ***id.*** at 198-202, 577 N.W.2d at 802-804.

In this case, Knoble and Johnson filed motions to suppress evidence alleging that the searches were performed without a warrant and without voluntary consent. In response to this motion, the State has provided evidence to show: (1) that Knoble and Johnson did, in fact, consent to the search of their vehicle and their apartment; (2) that Knoble and Johnson were both high school graduates who understood the English language; and (3) that Knoble and Johnson were not deceived, tricked, threatened, intimidated or punished during the search of their apartment. We conclude that this evidence is insufficient to satisfy the State's burden in this case.

[2] However, we will not review the facts alleged in the affidavit attached to the Johnson's motion to suppress. No one testified as to the truth of any of the facts contained in that affidavit, and both parties agree that the affidavit would have been inadmissible as hearsay.

The State has not demonstrated that Knoble and Johnson's consent, was *freely* given. "The proper test for voluntariness of consent under the fourth amendment is whether under the totality of the circumstances it was *coerced*." ***Bermudez***, 221 Wis.2d at 348, 585 N.W.2d at 632-33 (quoting ***State v. Johnson***, 177 Wis.2d 224, 233, 501 N.W.2d 876, 879 (Ct. App. 1993)) (emphasis added). The State has provided no evidence that the consent given at the initial stop was without coercion or duress. The State failed to produce any evidence, other than that contained on the taped statement, regarding the circumstances surrounding the initial stop, even though such evidence may have been available.[3]

The State contends that the taped statement *was* evidence that the consent was voluntarily given. We disagree. The tape provides evidence of consent, but it does not demonstrate that Knoble and Johnson's consent was given in the absence of duress or coercion. The statement "I consent" is not enough. Without clear and convincing evidence that the consent was voluntarily given, the State has failed to meet this burden.[4]

However, this does not end our analysis. The State argues that even if the initial consent was tainted or the result of duress or coercion, the search of the house was permissible because it was sufficiently attenuated from the initial stop.[5] Under the attenuation analysis, the State has the burden to show "a

[3] The State could have called Officers Spencer or Strunz, both of whom were present at the initial stop, to provide a clearer picture of the totality of circumstances in this case.

[4] We are only concluding that the State failed to meet its burden. We do not conclude that police misconduct occurred at the initial stop.

[5] We question whether this analysis is required when the State fails to meet its burden of proving that consent was freely given. Nonetheless, the parties have briefed the issue, and we address it.

sufficient break in the causal chain between the illegality and the seizure of evidence." *See* ***Phillips***, 218 Wis.2d at 204, 577 N.W.2d at 805. In determining whether such a break exists we will consider: (1) the temporal proximity of the misconduct and the subsequent consent to search, (2) the presence of intervening circumstances, and (3) the purpose and flagrancy of the official misconduct. *See* ***Bermudez***, 221 Wis.2d at 353, 585 N.W.2d at 634.

The State argues that there was a sufficient break in the causal chain between the initial alleged misconduct and the subsequent search because: (1) Knoble and Johnson had between three to ten minutes during the ride home to decide whether they wanted to withdraw their consent; (2) Knoble and Johnson were allowed to drive home alone; and (3) even if the police engaged in some kind of misconduct, there is little-to-no evidence that such misconduct was flagrant or purposeful. We disagree.

The State's evidence does not establish a sufficient break in the causal chain. Although Knoble and Johnson were permitted to drive home alone, and had anywhere from three to ten minutes to change their minds about consenting, that break is not sufficient. During the entire "break" described by the State, Knoble and Johnson were followed by police officers, and they were met by even more officers upon arriving at their apartment. The connection between the initial stop and the subsequent search had not become so attenuated as to dissipate the State's failure to show that Knoble and Johnson's consent to search the car was freely given. Accordingly, we also conclude that the State has failed to meet its burden under the attenuation analysis.

By the Court.—Order affirmed.

Not recommended for publication in the official reports. *See* RULE 809.23(1)(b)4, STATS.